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THE ROLE OF CIVILITY IN APPELLATE ADVOCACY

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Civility has a salutary function in legal proceedings. Its importance mirrors its critical role in other aspects of life. Yet, in many ways, incivility in society has become an art form; “road rage” comes to mind. Is it the armor that must be worn to survive the unceasing battles of modern life? Some might think that—I do not.

My aged *Black’s Law Dictionary* from law school notes that “civil” is derived from the Latin word “*civilis*,” meaning “a citizen”; being the opposite of “*barbarous*” or “*savage*,” it reflects “a state of society reduced to order and regular government.”¹ Of course, a derivative of “civil” is “civility,” meaning, among other things, “courtesy, politeness, respect, comity, . . . consideration, . . . propriety, . . . [or] protocol.”² Without civility, there can be no community. Some equate civility with good manners, a term which has been well defined as “respect for others” by a current movie about our culture (bemoaning, in part, the heralded “dumbing down of America”). In any event, there is much truth in the aphorism that “[c]ivility costs nothing and buys everything.”³

Civility in the legal process is always a timely topic. Of course, concern about incivility is nothing new.⁴ But over the past quarter century, incivility has been on the rise. Among the many well-known reasons for this are the increase in litigiousness; the greater number of lawyers; demands by clients for ultra-aggressive, uncompromising, “take no prisoners” tactics; the much larger damages at stake; the decline in professionalism (caused in part by lawyer advertizing); the internal pressures on lawyers in their expanding law firms (some might say “law factories”); and the growing impersonal nature of the practice of law in which lawyers, who hale from different parts of our country

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1. BLACK’S LAW DICTIONARY 311 (rev. 4th ed. 1968).

2. THE OXFORD THESAURUS 62 (American ed. 1992).

3. THE OXFORD DICTIONARY OF QUOTATIONS 480 (4th ed. 1992) (quoting letter from Lady Mary Wortley Montagu to Mary, Countess of Bute, May 30, 1756).

4. *E.g.*, *Kneeland v. American Loan & Trust Co.*, 138 U.S. 509, 513 (1891); *Green v. Elbert*, 137 U.S. 615, 624 (1891); *Dranow v. United States*, 307 F.2d 545, 549-50 (8th Cir. 1962); *Anderson v. Federal Cartridge Corp.*, 156 F.2d 681, 686 (8th Cir. 1946); *Kelley v. Boettcher*, 85 F. 55, 57-61 (8th Cir. 1898); *Zukas v. Appleton Mfg. Co.*, 115 N.E. 164, 164-65 (Ill. 1917); *Brownell v. McCormick*, 14 P. 651, 653-54 (Mont. 1887); *Flannagan v. Elton*, 51 N.W. 967, 967 (Neb. 1892); *Erwin v. Harris*, 254 P. 718, 718-19 (Okla. 1927); *Long-Bell Lumber Co. v. Newell*, 91 P. 697, 697-98 (Okla. 1907); *Commonwealth v. Davis*, 280 A.2d 119, 120 (Pa. 1971).

and do not know—or want to know—opposing counsel in personal terms, litigate hotly contested matters.⁵

Incivility, especially “hardball,” “scorched-earth,” “slash and burn,” or “Rambo” tactics, has caused wide-ranging and continuing concern, examination, and action, including the adoption of creeds and guidelines.⁶ Sadly, many of these are admonitions that should not be necessary; they cover conduct about which the bench and the bar should not need education or reminding, such as being punctual, or not sending copies of correspondence between counsel to the court unless permitted or invited by the court.⁷ Civility is also addressed in court rules and, more generally, in state disciplinary rules, especially in the preamble.⁸

The role of civility in appellate advocacy is the same as its role in any endeavor, including any phase of litigation. It is a key ingredient in efficient, economical, expeditious, harmonious, and respected problem solving. Restated, it is a vital component of the art of advocacy. Uncivil appellate advocacy is poor appellate advocacy.

Fortunately, if the paucity of commentary on the precise point is any guide, incivility in the appellate process is far less a problem than in other phases of litigation. In large part, this is because of the relatively short period of time allowed for the entire process; the somewhat rigid rules of appellate practice and procedure; the high standards set for, and required of, counsel; the ceremony, formality, and decorum involved; and the close supervision by the appellate court judges and other personnel.⁹

Another reason for this relative lack of appellate incivility is that most lawyers realize the immediate harm it causes them and their client. It is a classic example of “cutting off your nose to spite your face.”

One blatant type of incivility, the use of sarcastic, vituperative, scurrilous, or other disparaging remarks about opposing counsel or the judge or judges

5. For a similar discussion, see Sandra Day O'Connor, *Foreword* to PAUL B. PIXTON, *THE AMERICAN INNS OF COURT: RECLAIMING A NOBLE PROFESSION* 1 (1997).

6. *See id.* at 3; *infra* note 7.

7. *E.g.*, THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (1989), *reprinted in* TEXAS RULES OF COURT 491 (West 1999) (adopted in 1989 by the Supreme Court of Texas and the Texas Court of Criminal Appeals); Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 451 (1992) (guidelines adopted by the Seventh Federal Judicial Circuit); FEDERAL BAR ASSOCIATION STANDARDS FOR CIVILITY AND PROFESSIONAL CONDUCT (1998); ABA GUIDELINES FOR LITIGATION CONDUCT (1998).

8. *E.g.*, FED. R. APP. P. 38 (damages and costs for frivolous appeal), 46(b)-(c) (suspension, disbarment, or other discipline for “conduct unbecoming a member of the bar of the court”); MISS. R. APP. P. 2 (penalties for non-compliance with rules), 28(k), 40(c) (disrespectful language in briefs and motions for rehearing stricken with court to take additional appropriate action), 38 (damages and costs for frivolous appeal), 46(d) (disciplinary action “for conduct unbecoming a member of the bar, or for failure to comply with [appellate] rules”); MISSISSIPPI RULES OF PROFESSIONAL CONDUCT (1998); TEXAS STATE BAR RULES art. X, § 9 (1999) (Texas Disciplinary Rules of Professional Conduct).

9. *See, e.g.*, FED. R. APP. P.; MISS. R. APP. P.; *supra* notes 4, 8.

involved in earlier proceedings in the case, is seen far less often than in earlier days.¹⁰ Obviously, this form of incivility, in a brief or at oral argument, will not be tolerated. Some form of admonishment or sanction, such as the brief being stricken, will follow immediately.¹¹ Most lawyers know better than to go down that avenue of incivility.

Much more of a problem are other, often less obvious, forms of incivility. In any event, no matter how subtle the uncivil communication or action it is immediately obvious to the appellate court; it provides no benefit; and it adversely affects not only the uncivil lawyer, but far more important, his client.¹²

One example of this immediate and lasting adverse effect is when incivility occurs at oral argument. Due in large part to greatly increasing filings, oral argument is being permitted far less often. Our court grants it in only approximately thirty percent of our cases. For this and other obvious reasons, oral argument is an opportunity to be welcomed, appreciated, and exploited.

At oral argument, time is short and the court is focused on the issues at hand. (On our court, a great deal of time and effort is invested in preparing for it.) The court wants—indeed needs—input from counsel. Among other objectives, the court wants to test or challenge the strength or logic of positions advanced by counsel, and it attempts to receive that assistance, or achieve that purpose, primarily through answers to its questions. It does not need, much less want, to hear the briefs repeated or summarized. Questions by the appellate court provide an excellent means for counsel to highlight and explain the points considered critical by the court; among other things, these questions are a means of supplementing the briefs.¹³

This golden opportunity for counsel is squandered, for example: when he expresses frustration, sometimes anger, over having to respond to questions rather than being allowed to follow the format he has selected; when his

10. Counsel had this to say in *Hoover v. State ex rel. Selby*, 175 P. 117 (Okla. 1918):

“Throughout this whole trial we were reminded of the deliverance from the baneful influence of long-haired men and short-haired women, and every time we looked at the country attorney’s long hair we thought how true that was.”

Id. at 117. Counsel then proceeded to describe the trial judge as “the same judge who, when the politicians want to perforate the Constitution or undermine the Constitution, they run to this political judge.” *Id.* It goes without saying that the brief was stricken. *Id.* at 119; see *supra* note 4.

11. See *supra* notes 4, 8, 10; *infra* notes 12, 25, 27.

12. *E.g.*, *LaBuhn v. Bulkmatic Transp. Co.*, 865 F.2d 119, 124 (7th Cir. 1988) (“[A]lthough his client has prevailed in this appeal, [counsel] should not attribute his success to the rudeness that he displayed toward the judges of this court during oral argument.”); *State ex rel. Dyer v. Union Elec. Co.*, 312 S.W.2d 151, 154 (Mo. Ct. App. 1958) (“Frankly, resort to the use of such statements [odiums, sarcasm, and vituperative remarks] is an indication of a lack of confidence in the law and the facts to support the position of the one using them.”).

13. See O’Connor, *supra* note 5, at 2.

answers are hostile, terse, argumentative, evasive, obtuse, or even worse, erroneous; when he talks over the question being asked, or interrupts the questioning judge; or when he storms, or sulks, back to counsel table when his time has expired. When this occurs, nothing has been achieved. The exercise has been a waste of everyone's time and effort, and a great cost, both to the client financially and his chance of success.

Of course, incivility in appellate advocacy can take many other forms. One type, which has occurred in more than one argument, is counsel referring to the panel as "you guys." A more recent example was an appellee not responding in his brief to a case the appellant had cited in support of appellate jurisdiction over an interlocutory appeal. Counsel refused to do so on the ground that the citation was incorrect. Yet, the style was correct; it was a landmark case on this critical point; and, later in his brief, counsel even relied on a case that turned on the very one about which he self-righteously refused to respond.

Another example is counsel opining at oral argument that the other party had received "a helluva deal" in bankruptcy court. Needless to say, and as discussed *infra*, the foregoing tactics resulted in counsel being admonished during argument.

Likewise, referring to the opponent's position as "extreme paranoia," as seen recently in a brief, does little to advance resolution of the appeal. Yet other examples are lawyers at counsel table engaging in all sorts of head-shaking and pained facial expressions during opposing counsel's argument. A final example is counsel seeking, on oral argument rebuttal, to bring up a point not presented earlier in argument; if allowed to do so, appellee would, of course, have no chance to respond during argument.

Some might consider these examples and ask "so what"? It is hoped that, to most, the examples speak volumes about the need for, and role of, civility in appellate advocacy.

The decline in professionalism in the practice of law, among other concerns, prompted the creation of the American Inns of Court.¹⁴ Civility is one

14. See PIXTON, *supra* note 5. The American Inns of Court, begun approximately 20 years ago at the urging of Chief Justice Warren E. Burger, are modeled on the Inns of Court in England, and exist to promote excellence, civility, professionalism, and ethics in the practice of law. The movement is growing fast—there are 330 local Inns. Quite often, each Inn has ties to a nearby law school.

State and federal judges have taken an active role in promoting the Inns of Court movement and participate in local Inns. Often, the Inn is named for a distinguished jurist from that area. The Inn in Jackson, Mississippi, in which I participate, is named for Charles Clark, former chief judge of the United States Court of Appeals for the Fifth Circuit.

A local Inn generally consists of approximately 80 members from the bench and bar, grouped according to their experience as pupils (from the law school), associates, barristers, and benchers. Benchers are not limited to judges, and have permanent membership. The membership term for the other groups is from one to three years.

Usually, the periodic meeting of the Inn consists of a program on a legal topic presented by one of the several pupillage groups in the Inn (comprised of members from each of the membership groups) and dinner, at which members with different levels of experience and

of the Inns' four cornerstones, together with ethics, professionalism, and legal excellence. In fact, some equate "civility" with "professionalism." On the contrary, civility is a subpart of the other three principles.

This much is absolutely clear. Civility is *not* inconsistent with representing a client with zeal and fidelity within the rules.¹⁵ It does *not* mean that you are a "pushover." To use a popular phrase, it simply means that you are able to "disagree without being disagreeable."¹⁶ It is the hallmark of a true lawyer—a true professional. Without civility, there can be no professionalism.

In addition to the uncivil lawyer risking the imposition of sanctions and having his claims adversely affected, incivility has other obvious, deleterious effects. First, although it must be endured or suffered by only a small audience (clients, opposing counsel, court personnel, judges, and if oral argument is held, also by other persons in the courtroom), it nevertheless diminishes respect for the law. Along this line, for example, the Preamble to the Mississippi Rules of Professional Conduct states: "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."¹⁷ One oft-repeated reason for why the work of our courts must be respected is because they possess neither "the power of the purse" nor of "the sword." Without such respect, there will be no law.

This purpose served by civility cuts in all directions. It runs to opposing counsel, to court personnel, to the judges of the reviewing court, and to the judges of the trial and prior reviewing courts. A type of engendering respect for the law that comes immediately to mind is when opposing counsel, after completing argument, shake hands and leave the courtroom together, with one opening the gate in the bar for the other. To the panel, as well as to the others in the courtroom, this conduct reflects counsels' respect for the court, for the law, for the purpose it serves, and for each other. It reminds one that, no matter how much opposing counsel may disagree over the issues in the case, they understand the need for respect.

A second reason civility is so important is because, as noted earlier, it enhances greatly the ability to work together to reach fair, prompt, efficient, and relatively inexpensive resolution of litigated matters. Necessity for these goals is demonstrated, for example, by Rule 1 of the Federal Rules of Civil

backgrounds are urged to sit together. This is because mentoring is a key aspect of the Inns of Court movement. Along that line, the more senior members are urged to meet informally on other occasions with the less-experienced members. One example is a judge having a brown bag lunch in his chambers for the younger members.

15. See O'Connor, *supra* note 5, at 2-3; *From the President (Judge Patrick E. Higginbotham)*, THE BENCHER (American Inns of Court, Alexandria, Va.), Sept./Oct. 1998, at 2 ("The most powerful presentation loses none of its steely bite at the hands of an advocate with a reverence for the institution and its players."); see, e.g., TEXAS STATE BAR RULES art. X, § 9 (Texas Disciplinary Rules of Professional Conduct).

16. See also THE TEXAS LAWYER'S CREED—A MANDATE FOR PROFESSIONALISM (1989), reprinted in TEXAS RULES OF COURT 491 (1999).

17. MISSISSIPPI RULES OF PROFESSIONAL CONDUCT, pmbl., para. 4 (1998).

Procedure and Rule 102 of the Federal Rules of Evidence. The former states that the rules are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action.”¹⁸ The latter provides that the rules of evidence are to “be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹⁹

Because civility applies to all phases of appellate advocacy, it is difficult in many instances to distinguish between it, professionalism, legal excellence, and ethics. For instance, more and more often, defendants entering a guilty plea in federal court agree to waive the right to appeal except under certain circumstances, such as when an upward departure outside the Sentencing Guidelines is applied by the sentencing court. All too often, notwithstanding this waiver, counsel for the defendant will appeal even though the waiver exceptions do not apply, and even though counsel is not challenging the validity of the underlying plea agreement. In doing so, quite often, counsel does not even cite the plea agreement waiver, much less address why the appeal falls within an exception. The Government or the court *sua sponte* will raise the waiver; if the appeal is not within an exception, it will be dismissed.

Of course, notwithstanding its early disposition, the appeal had great cost in human and economic terms. Because the defendant had counsel on appeal, either retained or appointed, fees were incurred, the defendant’s hopes for a reversal were continued, the frivolous appeal was at considerable expense in time and money to the Government and to the court, and having to resolve it delayed attention being given by the Government and court to other appeals. In short, judicial efficiency and economy, among other things, went out the window.²⁰

Was this action by counsel a lack of professionalism, ethics, legal excellence, or simply of civility? It cuts across the board. Arguably, almost every improper action by appellate counsel has a similar effect. Other examples of such improper actions include frivolous appeals, unnecessarily using “push-button” words (a favorite is “disingenuous”), failing to cite correctly to the record, types of incorrect case citations, briefs of excessive length, and frivolous petitions for rehearing—especially for rehearing en banc. Each of these actions impedes the just, speedy, and inexpensive resolution of an appeal. Each runs counter to the attorney being an officer of the court, to his oath, and to the conduct otherwise required by disciplinary rules.²¹ Each exhibits lack of respect for the law, for the legal proceeding, for the court, and for opposing

18. FED. R. CIV. P. 1.

19. FED. R. EVID. 102.

20. Such action demands sanctions. Our court has imposed them *sua sponte*, to include counsel not only being fined, but also being denied appellate fees and expenses.

21. See, e.g., MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rules 3.1-3.4, 8.4 (1998); see *supra* note 8.

counsel.

In short, appellate advocacy is nothing more—but nothing less—than professional dialogue, written and sometimes oral, between counsel and the court.²² If that dialogue is good, it is of immense help to all concerned. Truly, to an appellate judge, it is a “thing of beauty.” Conversely, if, for instance, counsel is belligerent, not current in his research, sloppy in his citations, or excessive, then the optimum, much-needed dialogue is precluded. As noted, such conduct rebounds immediately against him and his client. The court cannot place faith, trust, or confidence in the lawyer. Where there can be no professional dialogue, in reality, there can be no appellate advocacy.

Incivility by and between judges also adversely impacts appellate advocacy. “A judge should be patient, dignified, respectful, and courteous to . . . lawyers, and others with whom the judge deals in an official capacity, and [as discussed *infra*] should require similar conduct of those subject to the judge’s control, including lawyers to the extent consistent with their role in the adversary process.”²³

Obviously, in order for there to be professional dialogue, judges must, in return, be civil to counsel. Likewise, to achieve the best results by the appellate court in that case, each judge must be civil to the other judges on the panel. (And, in general, to promote and maintain respect for the law, judges must be civil in their comments, as well as in other communications and actions, not only to the judges on their court, but also to judges on other courts.) Incivility by judges diminishes greatly respect for the law.

Judges’ incivility, as with lawyers, can take many forms. It can be found in questions from the bench, comments in opinions, and other communications with, or about, judges or counsel. Lack of promptness, such as not beginning proceedings on time, or long overdue decisions, is another form of judicial incivility.²⁴

As mentioned earlier, and as provided, for example, in the earlier-quoted federal judges’ Canon 3A(3), in their supervisory role, judges can foster civility by counseling uncivil counsel. As noted, such incivility may even require sanctions.²⁵

Through its opinion the appellate court can sanction or otherwise admonish

22. See O’Connor, *supra* note 5, at 2.

23. 2 GUIDE TO JUDICIARY POLICIES AND PROCEDURES: CODES OF CONDUCT FOR UNITED STATES JUDGES AND JUDICIAL EMPLOYEES, ch. 1, Canon 3A(3) (1997) (Code of Conduct for United States Judges); e.g., TEXAS CODE OF JUDICIAL CONDUCT Canon 3B(4) (1998).

24. E.g., 2 GUIDE TO JUDICIARY POLICIES AND PROCEDURES, *supra* note 23, ch. 1, Canon 3A(5); TEXAS CODE OF JUDICIAL CONDUCT Canon 3B(9) (1998).

25. See *supra* notes 8, 10, 20; 28 U.S.C. § 1927 (1994) (sanctions for “multipl[y]ing the proceedings in any case unreasonably and vexatiously”); *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43–46 (discussing courts’ inherent powers).

or caution uncivil counsel.²⁶ Not only will this advise and instruct the uncivil lawyer for that and future cases, it will also be instructive to lawyers reading the opinion.

If the uncivil conduct takes place during oral argument, the counseling can, and should, also take place then. Again, it will be instructive to all lawyers in the courtroom. Of more immediate assistance for the case being argued, it should cause counsel quickly to return to why he is there in the first place—to argue the issues.

Another form of supervision is by a judge reporting the uncivil conduct to the appropriate disciplinary body.²⁷ This may result in suspension, disbarment, or some other form of discipline.

Depending on a judge's other duties, such as serving as chief judge of an appellate court, or as the presiding judge for one of its panels, a judge's supervisory role may also apply to judges as well, to include assisting with the prompt disposition of matters before the court. For example, Canon 3B(5) for federal judges provides: "A judge with supervisory authority over other judges should take reasonable measures to assure the timely and effective performance of their duties."²⁸

All of this—the need for civility by lawyers, judges, and other personnel involved in the appellate process—serves to maintain respect for the law, and to assist in the just, speedy, and inexpensive resolution of disputes. And that is what appellate advocacy is all about. We vest the appellate process with imposing and inspiring courthouses and courtrooms, solemnity, formality, and ceremony in order to raise the proceedings above the common level, and especially in that regard, to remind the court and counsel of the role and majesty of the law and particularly of the task at hand—the pursuit of justice.²⁹ Civility helps ensure that this pursuit, this noble goal, is not delayed, sidetracked, or freighted with distractions or matters that are not central to the issues at hand. It is vital; it must be maintained; it must be enforced. Civility must be championed by the bench and the bar. Incivility must find no sanctuary in the appellate process.

26. See *supra* notes 4, 10, 12.

27. E.g., MISSISSIPPI CODE OF JUDICIAL CONDUCT Canon 3B commentary (1995); *Commonwealth v. Davis*, 280 A.2d 119, 120 (Pa. 1971); *supra* note 8.

28. 2 GUIDE TO JUDICIARY POLICIES AND PROCEDURES, *supra* note 23, ch. 1, Canon 3B(5).

29. How can an appellate advocate not "endeavor to live above the common level of life," as sought in the Cadet Prayer, United States Military Academy, on hearing this part of the opening cry in federal court: "God save the United States and this honorable court"?